87-1411

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

in the Supreme Court of the United States

October Term, 1988

NEW ENGLAND INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

Guy B. Bailey, Jr.
Counsel of Record for Petitioner
Bailey, Dawes & Hunt,
a professional association
1390 Brickell Avenue
Miami, Florida 33131-3399
(305) 374-5505

February 22, 1988

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE ENTRY OF A JUDGMENT AFTER DEFAULT, WITHOUT NOTICE OR HEARING ON THE ISSUE OF DAMAGES.

PARTIES

Petitioner:

New England Insurance Company, Defendant in the trial court and Appellant in the Florida Third District Court of Appeal.

Respondent:

International Bank of Miami, N.A., Plaintiff in the trial court and Appellee in the Florida Third District Court of Appeal.

Additionally, the following were parties in the trial court but not in the appellate court, and are not affected by this proceeding:

(1) Laurans A. Mendelson, a director of International Bank of Miami, N.A. and defendant in the trial court.

(2) Frank Preve, Jr., former president of International Bank of Miami, N.A. and a defendant in the trial court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW ...	i
PARTIES ...	ii
TABLE OF CONTENTS ...	iii
TABLE OF AUTHORITIES ...	iv, v
OPINION BELOW ...	1
STATEMENT OF GROUNDS FOR JURISDICTION ...	2
CONSTITUTIONAL PROVISION INVOLVED ...	3
STATEMENT OF CASE ...	4
ARGUMENT ...	7
APPENDIX ...	App. 1

TABLE OF AUTHORITIES

CASES	Pages
Boddie v. Connecticut, 401 U.S. 371 (1971)	10
Bowman v. Kings Land Development Company, 432 So.2d 660 (Fla. 5th DCA 1983)	7
Buffington v. Torcise, 504 So.2d 490 (Fla. 3d DCA 1987)	7
Calder v. McNess, 427 So.2d 393 (Fla. 4th DCA 1983)	7
Hammond Packing Co. v. State of Arkansas, 212 U.S. 322 (1909)	10, 12
Henry v. Mississippi, 379 U.S. 443 (1965)	11, 12
Hovey v. Elliott, 167 U.S. 409	12
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	2
Logan v. Zimmerman Brush Co., 455 U.S. 420 (1982)	9, 10
Mathews v. Eldridge, 424 U.S. 319 (1976)	8, 9

TABLE OF AUTHORITIES (Continued)

CASES	Pages
New England Insurance Company v. International Bank of Miami, N.A., 514 So.2d 390 (Fla. 3d DCA 1987)	1, 6
North American Accident Insurance Co. v. Moreland, 60 Fla. 153, 53 So. 635 (1910)	8
North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1971)	9
Overseas Development, Inc. v. Dominion Mortgage Corp., 330 So.2d 845 (Fla. 3d DCA 1976)	8
Palmore v. Sidoti, 466 U.S. 429 (1984)	2
Staub v. City of Baxley, 355 U.S. 313 (1958)	11
Wright v. Georgia, 373 U.S. 284 (1963)	11
OTHER AUTHORITIES	
U.S. Const. amend XIV	3, 7, 13
Rule 1.440(e), Fla. R. Civ. P.	7

OPINION BELOW

The opinion below is reported: *New England Insurance Company vs. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. 3d DCA 1987). [App. 3]

STATEMENT OF GROUNDS FOR JURISDICTION

On October 6, 1987, the Third District Court of Appeal of Florida affirmed the trial court's "Amended Order Denying New England Insurance Company's Motion for Relief from Final Judgment and to Vacate Default," refusing to set aside a final default judgment against Petitioner. [App. 1, 3] The appellate court denied rehearing on November 23, 1987. [App. 5]

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) (1982). This is a final judgment or decree by the highest court in Florida in which a decision could be had. The Third District Court of Appeal affirmed, without opinion, 514 So.2d 390 (Fla. 3d DCA 1987), eliminating the Florida Supreme Court's jurisdiction to review the case. *See* Fla. Const. Art. V, § 3(b)(3); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). This Court has granted certiorari to review federal questions in similar circumstances. *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The due process clause of U.S. Const. amend XIV provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Florida trial court violated Petitioner's due process rights by entering a judgment of $4,600,000 on a default with no notice or hearing or evidence whatever on the issue of damages.

Respondent, International Bank of Miami ("IBM"), sued Petitioner, New England Insurance Company ("New England"), based on New England's liability policy issued to IBM. IBM claimed losses "in excess of $4,600,000" for the fraud, conversion, and negligent and dishonest acts of its former president, Frank Preve. [App. 6] IBM did not attach a copy of the New England policy to the complaint.

New England was served with process by the Florida Insurance Commissioner on July 13, 1984. New England did not respond because the summons and complaint were misfiled among documents from another, federal court proceeding in which New England was a party, which also arose out of Preve's misdeeds.[1]

Over a year after service of process, on August 12, 1985, IBM moved for entry of default against New England; the Clerk of the Eleventh Judicial Circuit of the State of Florida entered the default on the same day.[2]

---

[1]Extensive deposition testimony and documentary evidence filed with the trial court explained the handling of the file for the IBM claims arising from the Preve misconduct, and the circumstances that led to the misfiling.

[2]IBM served Preve with process on August 12, 1985. Preve did not respond and was defaulted on October 21, 1985.

Over eight months later, on April 30, 1986, IBM obtained a final judgment against New England and Preve for $4,600,000 plus attorneys' fees and costs. All this was done without notice to New England or hearing on the amount of damages. IBM filed no papers, sworn or otherwise, setting forth the amount of its damages. The only "proof" of damages was an allegation in the complaint that IBM had suffered losses "in excess of $4,600,000." There was no allegation or proof of the amount or terms of insurance coverage; in fact, the insurance policy was not even annexed to the complaint and was not part of the record before the trial court. [App. 6]

On September 19, 1986, the trial court then entered an amended final judgment against New England for the $4,600,000 and for costs. There was also no prior notice to New England or hearing before entry of the amended final judgment.

New England had no knowledge of the entry of judgment against it until September 26, 1986, when IBM sent a copy of the amended final judgment to New England, by certified mail.

New England moved for relief from final judgment and to vacate the default on November 18, 1986, setting forth grounds for vacating the default judgment. Among other things, New England argued (1) that IBM had already recovered $1,000,000 of its losses from another insurer; (2) that New England's policy (referred to in, but not attached to, the complaint) had a $3,000,000 limit as to claims arising from Preve's actions; and (3) that the policy did not cover the delinquent bank officer's actions.

The trial court heard argument on New England's motions for relief from final judgment and to vacate default. The trial court refused to set aside the default. And it refused to require a hearing regarding the amount of damages to be paid by New England. The trial court deemed the damages "liquidated" merely by reason of the prayer for relief in the complaint [App. 11-12], and entered an order denying New England's motion and amended motion for relief from final judgment and to vacate default.

On March 12, 1987, the trial court vacated its original order and entered an amended order to the same effect, *nunc pro tunc* as of February 23, 1987. New England appealed this order to the Florida Third District Court of Appeal on March 23, 1987.

The Florida Third District Court of Appeal affirmed the judgment of the trial court *per curiam*, without opinion. *New England Insurance Company v. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. 3d DCA 1987).

Petitioner moved for rehearing of this decision; rehearing was denied on November 23, 1987.

The federal due process argument was considered by both the trial court and appellate courts below, having been raised before the trial court in Petitioner's "Motion for Relief from Default and from Ex-Parte Judgments" and Petitioner's "Motion for Rehearing" from the Order denying its motions. Due process was also raised in Petitioner's Initial and Reply Briefs and in its Petition for Rehearing in the appellate court. The

record as a whole shows that Petitioner's federal claim was presented and considered in the state court.

ARGUMENT

Petitioner has been deprived of due process rights granted by U.S. Const. amend XIV, by the failure of the Florida courts to grant it a hearing on the amount of damages to be paid to IBM following a default. Petitioner was ordered to pay $4,600,000 without any hearing whatever on the amount of damages. This is clearly a due process violation, unsupported by any possible significant state interest.

1. The Purported Right to a Pre-Judgment Hearing on Liquidated Damages is Illusory

The Florida procedure applied in this case automatically deems damages "liquidated", i.e., set in stone and unchangeable, by the very fact that there was a default. Any right to a prejudgment hearing on damages under the Florida Rules was therefore illusory, by virtue of the very means by which the Florida procedure was applied.

Florida law holds that, "a defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination for the amount of *unliquidated* damages." *Bowman v. Kings Land Development Company*, 432 So.2d 660, 663 (Fla. 5th DCA 1983) *See also Calder v. McNess*, 427 So.2d 393 (Fla. 4th DCA 1983); *Buffington v. Torcise*, 504 So.2d 490 (Fla. 3d DCA 1987); Rule 1.440(e), Fla. R. Civ. P.

However, Florida courts have also held that the amount of damages to be paid by the defaulting party cannot be contested, thereby completely denying due process rights to the defaulting party. *Overseas Development, Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845, 847 (Fla. 3d DCA 1976); *North American Accident Insurance Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910).

The holding of the Florida court, following Florida law, that a default judgment automatically transforms any and all damages into "liquidated damages" is completely off the mark and a clear violation of due process. Even though Florida law ostensibly allows a defaulting defendant a hearing on "unliquidated" damages, since damages are *automatically* deemed liquidated (in which case there is no hearing), the supposed right to hearing is sham and illusory.

The unconscionable result of this Florida rule is that whatever outrageous and overstated amount of damages a plaintiff may have chosen to claim in his complaint, automatically becomes the "liquidated" or unchangeable amount that must be paid by a defendant upon default. Such a procedure is anathema to the tenets of due process as set forth by this Court.

As stated in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

* * *

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

424 U.S. at 333.

The Court held in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 606-608 (1971), that property cannot simply be seized or taken on the *ex parte* representation of *one* party to a dispute. The Georgia garnishment statute considered in *Di-Chem* allowed issuance of a writ of garnishment solely on the affidavit of the creditor or his attorney with no input from the debtor. Under the Georgia statute, the affidavit only needed to contain "conclusory allegations." 419 U.S. at 606. The writ was then issued automatically by the clerk of court. This Court held the statute unconstitutional on the grounds that such *ex parte* taking of property violates due process.

Petitioner's situation is analogous to that of the garnishee in *Di-Chem*. Under the Florida procedure, New England is about to be deprived of over $4,600,000 solely on the basis of the conclusory and unchallenged allegations of IBM in its complaint. Under this Court's holding in *Di-Chem*, such action clearly violates due process.

New England is entitled to a hearing on damages "at a meaningful time," post-default and prior to entry of judgment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). The state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

As in *Logan*, the deprivation suffered by New England is "final" and irrevocable. The Florida rule automatically "liquidating" damages upon default, results in "[a] system or procedure that deprives persons of their claims in a random manner," a result specifically disapproved by the Court in its decision in *Logan*. 455 U.S. at 434.

2. There is No Significant Countervailing State Interest

This Court cannot allow state procedural rules to violate important federal rights. As stated by the Court in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971):

> [D]ue process requires, at a minimum that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

New England does not deny that states have an interest in enforcing default procedures. Nor does New England challenge here the entry of the default against it. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909). New England objects to the Florida court's refusal to allow it a hearing on damages once the default was a *fait accompli*.

Allowing a hearing on the issue of damages post-default could not and does not frustrate the State of Florida's interest in enforcing defaults. Federal due

process rights of Petitioner far outweigh any possible state interest in avoiding delay in disposition of cases in the state courts. Such minor state interest, if any, cannot and does not override the serious due process violation suffered by Petitioner and others similarly situated at the hands of the Florida courts. As stated in *Henry v. Mississippi*, 379 U.S. 443, 448-9 (1965), giving effect to a procedural rule "for its own sake 'would be to force resort to an arid ritual of meaningless form.' " 379 US. at 449, *citing Staub v. City of Baxley*, 355 U.S. 313 (1958); *Wright v. Georgia*, 373 U.S. 284 (1963).

More importantly, as the Court stated in *Henry:*

> [T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.
>
> * * *
>
> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

379 U.S. at 447-8.

As shown above, the State's interest here, in refusing to allow hearings on the issue of damages, is minimal, if any.

The Florida procedural rules operate to *punish* a defaulting defendant by automatically deeming his damages "liquidated" so that he cannot obtain a hearing on the issue of damages. A defaulting defendant is forced to pay whatever damages the plaintiff requested without any opportunity to show setoff, or to show that the amount is wrong or exaggerated. Where, as here, a party has been deprived of due process, as a punitive measure, due process is violated. *See Hovey v. Elliott*, 167 U.S. 409 (1897); *Hammond*, 212 U.S. at 397.

Due process requires that New England have notice and opportunity to present evidence on the issue of damages due the Respondent *before* the actual taking of its property. New England has been deprived of valuable property rights in the amount of $4,600,000 plus interest without notice and in violation of due process.

CONCLUSION

This Court should issue a writ of certiorari to correct the state court's violation of U.S. Const. amend XIV.

Respectfully submitted,

Guy B. Bailey, Jr.
BAILEY, DAWES & HUNT
a professional association
1390 Brickell Avenue
Penthouse
Miami, Florida 33131-3399
(305) 374-5505

February 22, 1988

Appendix

APPENDIX

	Page
Amended Order Denying New England Insurance Company's Motion for Relief from Final Judgment	App. 1
Order of Florida Third District Court of Appeal	App. 3
Order Denying Rehearing before the Florida Third District Court of Appeal	App. 5
Excerpts from IBM's Complaint	App. 6
Excerpts from Hearing before the Trial Court on Petitioner's Motion to Vacate Default Judgment	App. 9

[EXCERPTS FROM ORDER OF TRIAL COURT]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-08521 CA 14

[Style Omitted]

AMENDED ORDER DENYING NEW ENGLAND INSURANCE COMPANY'S MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT AND DENYING NEW ENGLAND'S AMENDED AND/OR RENEWED MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT, AND STAYING ENFORCEMENT UPON FILING BOND

THIS CAUSE, having come before this Court on February 3, 1987, and February 12, 1987, on New England Insurance Company's Motions For Relief from Final Judgment and on New England's Amended and/or Renewed Motion for Relief from Final Judgment and to Vacate Default, and the Court having heard argument of counsel, having reviewed legal memoranda, having reviewed the record, including the depositions and related exhibits and an affidavit, and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. The Court's Order of February 23, 1987, is vacated.

2. New England Insurance Company's *ore tenus* request for leave to file its February 3, 1987, Amended and/or Renewed Motion, etc., together with attachments, is granted; the Court has considered such filings in making its determination.

3. New England Insurance Company's Motion for Relief from Final Judgment and to Vacate Default and its Amended and/or Renewed Motion for Relief from Final Judgment and to Vacate Default, etc., are hereby denied.

* * *

5. This Amended Order shall be effective *nunc pro tunc* as of February 23, 1987.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12 day of March, 1987.

RICHARD YALE FEDER
CIRCUIT COURT JUDGE

* * *

NEW ENGLAND INSURANCE COMPANY, Appellant,

v.

INTERNATIONAL BANK OF MIAMI, N.A., Appellee.

No. 87-706.

District Court of Appeal of Florida, Third District.

Oct. 6, 1987.

Rehearing Denied Nov. 23, 1987.

An Appeal of a non-final order from the Circuit Court of Dade County; Richard V. Feder, Judge.

Bailey, Dawes & Hunt and Mercedes C. Busto, Miami, for appellant.

Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey and John H. Schulte and David B. McCrea and W. Barry Blum, Miami, for appellee.

Before HUBBART and NESBITT and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969); *North Am. Accident Ins. Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910); *Bil-Jax, Inc. v. Williamson*, 497 So.2d 1350 (Fla. 4th DCA 1986); *Bowman v. Kingsland Dev., Inc.* 432 So.2d 660 (Fla. 5th DCA 1983); *Cricket Club, Inc. v. Basso*, 384 So.2d 908, 909 (Fla. 3d DCA 1980); *Kentucky Farm Bureau Mut. Ins. Co. v. Mills*, 367 So.2d 673 (Fla. 2d DCA), *cert. denied*, 376 So.2d 74 (Fla. 1979); *Overseas Dev., Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845 (Fla. 3d DCA 1976), *cert. denied*, 342 So.2d 1103 (Fla. 1977); *Winter Park Arms, Inc. v. Akerman*, 199 So.2d 107 (Fla. 4th DCA 1967); *Confederation of Canada Life Ins. Co. v. Vega Y Arminan*, 135 So.2d 867 (Fla. 3d DCA 1961), *cert. denied with opinion*, 144 So.2d 805 (Fla. 1962).

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1987

MONDAY, NOVEMBER 23, 1987

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy
ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By /s/ Evelyn A. Hillman
Deputy Clerk

cc: Mercedes C. Busto
John H. Schulte

/aeh

[EXCERPTS FROM COMPLAINT OF INTERNATIONAL BANK OF MIAMI, INC.]

[Style omitted]

AMENDED COMPLAINT

Plaintiff sues Defendants and in support thereof alleges as follows:

* * *

4. Defendant, Frank Preve, Jr. was President of the Bank at all times material.

* * *

6. At all times material hereto, the Defendant, New England Reinsurance Corporation, had in full force and effect a liability insurance policy, Number DO-300078, covering the officers and directors of the Bank, which was for the benefit and protection of the Bank.

* * *

COUNT IV

Fraud Against Frank Preve, Jr.

36. Plaintiff realleges the allegations of paragraphs 1 through 31 of this Complaint.

37. Commencing on or about August 1981, and continuing to February 1982, Mr. Frank Preve, Jr., former President of the Bank, without authority, dishonestly, fraudulently, and in gross and complete disregard for the welfare of the Bank, initiated, authorized and engaged in various improper transactions including unauthorized transfers of funds, extensions of credit above the Bank's legal lending limit, extensions of credit to persons without proper substantiating documents, extensions of credit beyond his authority, manipulation of the Bank's records so that loans were not properly monitored or collected, and extensions of credit to persons with knowledge that those persons would never repay the Bank.

38. As a direct result of Mr. Preve's conversion and negligent and dishonest acts, the Bank has suffered losses and damages of more than $4,600,000 plus interest.

39. The Bank demanded that Mr. Preve repay the amounts illegally misappropriated and lost through his actions but he has refused to repay the Bank.

* * *

COUNT VI

New England Reinsurance Corporation Policy

45. Plaintiff realleges the allegations of paragraphs 1 through 44 of this Complaint.

46. Defendant, New England Reinsurance Corporation is liable to the Bank for the losses claimed in Counts IV and V of this Complaint to the extent those losses resulted from the errors, omissions, acts and breaches of duty of the Defendant officers and directors, as covered by the aforesaid liability policy issued by New England Reinsurance Corporation.

WHEREFORE, Plaintiff, The International Bank of Miami, N.A., demands judgment as follows:

* * *

(c) For damages in the amount of $4,600,000.00 against Defendants named in Count IV, Count V and Count VI of this Complaint, jointly and severally, together with punitive damages and interest * * * .

FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG,
MANLEY & CASEY
Attorneys for Plaintiff,
The International Bank
of Miami, N.A.
Suite 1000 Flagship Center
777 Brickell AVenue
Miami, Florida 33131
(305) 371-2600

By: /s/ Gregory P. Borgognoni
Gregory P. Borgogoni

[EXCERPTS FROM HEARING BEFORE TRIAL COURT]

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8521 CA

INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.,

Defendants.

Dade County Courthouse,
Miami, Florida
Tuesday, 9:35 a.m.

February 3, 1987

The above-entitled case came on for hearing before the Honorable RICHARD YALE FEDER, as Judge of the above-styled court at the Dade County Courthouse, Miami, Dade County, Florida, on the 3rd day of February, 1987, commencing at 9:35 a.m.

APPEARANCES:

JOHN H. SCHULTE, ESQ.
and DAVID McCREA, ESQ.
of the law offices of
Finley, Kumble, Wagner, Heine,
Underberg, Manley, Myerson & Casey
on behalf of the Plaintiff

GUY B. BAILEY, JR., ESQ.
of the law offices of
Bailey, Dawes & Hunt, P.A.
on behalf of the Defendants

ALSO PRESENT:

AARON PODHURST, ESQ.

(Thereupon the following proceedings were had:)

THE COURT: Would you state your appearances for the court reporter, please.

MR. BAILEY: May it please the Court, Guy Bailey with Bailey, Dawes & Hunt, counsel for New England Insurance Company, formerly known as New England Reinsurance Company.

With us also is Kevin Barber, who is a claims manager supervisor for that company.

* * *

MR. BAILEY: * * * The other issue, which we haven't heard any conversation about, is whether a judgment should be issued on that without giving any notice. It is clear there was no notice given. These are not liquidated damages. These are just damages alleged in the complaint. Liquidated damages are negotiable instruments or specific terms of the contract, not just the terms of the complaint. So there should have been, even if you didn't set the default aside here on the amount of damages, but I think under North Shore and the cases following it, that unless it partakes of something like deliberate thumbing of its nose at the Court, justice is this way. The guideline is you should set it aside.

THE COURT: Maybe this is the case where the appellate courts will give me some guidelines because I think counsel is correct that it is almost an ad hoc decision, depending upon how the appellate judges felt the morning they heard the appeal. I think there should be some guidelines, but from what I read in this case, I'm satisfied that there was neglect, but not excusable neglect.

* * *

As far as notice of default, I don't know that liquidated requires a note, a mortgage, a real estate contract. Liquidated means that the parties know what it is being sued for. It is not in question. It is not in dispute. The amount for which the directors and Preve were being held for was known, four point whatever million dollars.

MR. BAILEY: Judge, all we knew was what the claim was.

THE COURT: That was a specific liquidated amount. They weren't saying hold us harmless for whatever we get hit for. It was for 4.6 million. I feel that was liquidated. I don't feel notice was necessary.